

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANOVA APPLIED ELECTRONICS,  
INC.,

Plaintiff,

v.

PRECISION APPLIANCE  
TECHNOLOGY, INC.,

Defendant.

Case No. 2:22-CV-00042-RAJ

**ORDER**

**I. INTRODUCTION**

This matter is before the Court on several pending motions: the parties' joint motion regarding the protective order (Dkt. # 28), Defendant's motion to supplement Docket # 28 (Dkt. # 31), Plaintiff's motion for an extension of time to join additional parties and extend discovery (Dkt. # 32), and Defendant's motion to stay proceedings pending resolution of Defendant's motion for summary judgment (Dkt. # 40). The Court has reviewed the parties' submissions and decided the motions without oral argument. *See* Local Civil Rule (LCR) 7(b)(4).

## II. BACKGROUND

Plaintiff Anova Applied Electronics, Inc. (“Anova” or Plaintiff) is a San Francisco-based company that creates smart kitchen appliances. Dkt. # 1, ¶ 6 (Compl.). Plaintiff is suing Defendant Precision Appliance Technology, Inc. (“Precision” or Defendant) for infringement of Plaintiff’s Precision Cooker sous vide immersion circulator, covered by U.S. Patent No. D 862,154 (the “D154 patent”). *Id.*, ¶¶ 14, 16. Plaintiff alleges that Defendant advertises, offers for sale, and/or sells the Vesta Precision Sous Vide Immersion Circulator (the “Accused Product”) on Amazon to customers throughout the United States. *Id.*

On October 13, 2022, Defendant filed a Motion for Summary Judgment of Non-Infringement, or Alternatively, Invalidity. Dkt. # 35. Defendant argues that the Accused Product does not infringe on the D154 patent, and alternatively, that the D154 patent is invalid in light of Plaintiff’s prior art product. *Id.* Defendant’s summary judgment motion is under advisement.

## III. DISCUSSION

### a. Motion to Supplement Docket (Dkt. # 31) and LCR 26 Protective Order Dispute (Dkt. # 28)

The parties agree that a protective order should be entered in this case, but jointly request that the Court resolve a dispute concerning access to highly confidential information. Specifically, the parties’ dispute concerns the potential designation of Plaintiff’s in-house counsel Ray Ashburg with permission to view Defendant’s information or items marked “CONFIDENTIAL.” Each party submitted proposed protective order language pursuant to LCR 26(c)(2). Dkt. # 28. As an initial matter, the Court **GRANTS** Defendant’s unopposed motion to supplement its written arguments filed in response to Plaintiff’s “corrected/supplemental” declaration of Mr. Ashburg. Dkt. # 31.

Moving on to the substance of the parties’ request, with regard to Section 4.2 of

1 the proposed protective order, Plaintiff proposes the following language:

2  
3 “4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise  
4 ordered by the court or permitted in writing by the designating party, a receiving  
party may disclose confidential material only to:

5 (a) the receiving party’s counsel of record in this action, as well as  
6 employees of counsel to whom it is reasonably necessary to disclose the  
7 information for this litigation;

8 (b) the officers, directors, and employees (including in house counsel) of  
9 the receiving party to whom disclosure is reasonably necessary for this  
10 litigation, unless a party designates that a particular document or  
11 material produced is for LITIGATION COUNSEL’S EYES ONLY. For  
12 the sake of clarity, designation as “LITIGATION COUNSEL’S EYES  
ONLY” includes Ray Ashburg, Anova’s litigation counsel of record in  
this suit...”

13 Dkt. # 28-1 (Proposed Protective Order) at 4. Defendant, on the other hand,  
14 proposes the following language:

15 “4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise  
16 ordered by the court or permitted in writing by the designating party, a receiving  
17 party may disclose confidential material only to:

18 (a) the receiving party’s counsel of record in this action, as well as employees  
19 of counsel to whom it is reasonably necessary to disclose the information  
for this litigation;

20 (b) the officers, directors, and employees (including in house counsel) of the  
21 receiving party to whom disclosure is reasonably necessary for this  
22 litigation, unless a party designates that a particular document or material  
23 produced is for Outside Attorney’s Eyes Only. For the sake of clarity,  
24 designation as “OUTSIDE ATTORNEY’S EYES ONLY” excludes Ray  
Ashburg...”

25 *Id.*

26 Plaintiff argues that Mr. Ashburg, Senior Associate General Counsel and Head of  
27 North America IP for Plaintiff’s parent company Electrolux, should be permitted to

1 view information that Defendant considers to be for “Outside Counsel’s Eyes Only.”  
2 Dkt. # 28 at 3. According to Mr. Ashburg’s Corrected Declaration, he manages and  
3 advises on intellectual property-related agreements, including technology and brand  
4 licensing agreements, for Electrolux. Dkt. # 30 at 2. He states that he advises on  
5 trademark clearances and “filing/prosecution/opposition of trademark applications” for  
6 both Electrolux and Anova. *Id.* He is also Anova’s counsel of record in this matter. *See*  
7 Dkt. ## 9, 10. Further, Mr. Ashburg states that he does not participate in any business or  
8 commercial activity at Electrolux or Anova, has no role in forming or assisting any  
9 strategic business or commercial decisions at either company, and does not handle  
10 patent preparation or patent prosecution for Anova. *Id.* at 4. Plaintiff argues that Mr.  
11 Ashburg has no strategic or competitive business decision-making authority, and that if  
12 Mr. Ashburg’s access to confidential material is prohibited, Plaintiff will be  
13 substantially prejudiced because Mr. Ashburg, as counsel of record, has been heavily  
14 involved in this case since its filing. Dkt. # 28 at 4. According to Plaintiff, thus far,  
15 Defendant has declined to produce confidential information in response to various  
16 discovery requests due to this dispute over Mr. Ashburg and has indicated that it will  
17 produce responses once a protective order limiting Mr. Ashburg’s access to highly  
18 confidential information is in place. Dkt. # 30 at 15-19.

19 Defendant argues that Electrolux, Mr. Ashburg’s employer, is a potential  
20 competitor of Precision and that to allow counsel to a potential competitor and non-party  
21 access to confidential information would create potential for abuse and prejudice  
22 Defendant. Dkt. # 28 at 11. Defendant argues that Mr. Ashburg is a competitive decision  
23 maker, as evidenced by the responsibilities listed in his online LinkedIn profile. Dkt. # 28  
24 at 11. As of August 2022, Mr. Ashburg’s profile indicated that his responsibilities as  
25 Associate General Counsel at Electrolux North America included IP litigation,  
26 trademarks, technology and brand licensing, and anticounterfeiting. Dkt. # 28, Ex. 1.  
27 Defendant argues that his involvement with licensing and IP-related activities constitutes

1 competitive decision making, such that he should be barred from viewing Defendant's  
2 highly confidential materials. Dkt. # 31 at 3.

3 Under Federal Rule of Civil Procedure 26(c) the Court may, for good cause and  
4 with a showing that the parties have conferred in good faith, issue a protective order.  
5 Fed. R. Civ. P. 26(c)(1). Further, the Court may "make any order which justice requires  
6 to protect a party or person from annoyance, embarrassment, oppression, or undue  
7 burden or expense, including... requiring that a trade secret or other confidential  
8 research, development, or commercial information not be revealed or be revealed only  
9 in a specified way[.]" Fed. R. Civ. P. 26(c)(1)(G). The Court must balance the  
10 conflicting interests of the parties when considering protective orders for trade secrets,  
11 specifically the risk to Defendant of inadvertent disclosure of trade secrets to  
12 competitors against the risk that Plaintiff's prosecution of its claims will be impaired.  
13 *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992). In  
14 evaluating the parties' conflicting interests, the Court should look at the parties'  
15 "specific factual circumstances." *Id.* at 1471. "In granting a protective order that  
16 excludes counsel or others from access to confidential information, the sole question is  
17 whether there is an unacceptable risk or opportunity for the inadvertent disclosure of  
18 confidential information." *ODS Tech., L.P v. Magna Entm't Corp.*, 583 F.Supp.2d 1141,  
19 1144 (citing *Matsushita Elec. Indus. Co. Ltd. v. U.S.*, 929 F.2d 1577, 1579 (Fed. Cir.  
20 1991)); *Autotech Tech. Ltd. P'ship v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 407  
21 (N.D. Ill. 2006)). Crucially, the Court must consider whether the proposed designees are  
22 engaged in "competitive decision making," because if the designees are engaged in such  
23 endeavors, "the risk of disclosure may outweigh the need for confidential information."  
24 *Intel Corp. v. Via Tech., Inc.*, 198 F.R.D. 525, 529 (N.D. Cal. 2000) (citing *U.S. Steel*  
25 *Corp. v. U.S.*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)). "Competitive decision making" is  
26 "shorthand for counsel's activities, association, and relationship with a client that are  
27 such as to involve counsel's advice and participation in any or all of the client's

1 decisions (pricing, product design, etc.) made in light of similar or corresponding  
2 information about a competitor.” *Intel*, 198 F.R.D. at 529 (quoting *U.S. Steel*, 730 F.2d  
3 at 1468 n.3).

4 The Court is not persuaded that Mr. Ashburg is in fact a “competitive decision  
5 maker” at either Electrolux or Anova. Mr. Ashburg states that he manages and advises  
6 only parent company Electrolux (and not Anova) on IP related agreements, Dkt. 30 at 2,  
7 and that he does not take part in any commercial or business activity at either Electrolux  
8 or Anova. Further, he states that he does not handle patent preparation or patent  
9 prosecution for either company. *Id.* at 4. While Defendant attempts to rebut these  
10 statements with Mr. Ashburg’s LinkedIn profile, the Court has no reason to doubt  
11 counsel’s averments that he is isolated from competitive business activities. The Court  
12 finds Defendant’s speculative assertion that Electrolux could be in “future competition”  
13 with Precision unpersuasive, especially coupled with Mr. Ashburg’s statement that he  
14 does not take part in any strategic business or commercial decisions for Electrolux. *See*  
15 *American Standard v. Pfizer, Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987) (noting that  
16 “[c]ourts have presumed that disclosure to a *competitor* is more harmful than disclosure  
17 to a *noncompetitor*”).

18 While some courts have held that negotiating licensing agreements in litigation  
19 constitutes competitive decision making, *see, e.g., Intel Corp. v. VIA Techs, Inc.*, 198  
20 F.R.D. 525, 530 (N.D. Cal. 2000) (stating, “[in-house counsel’s] involvement in  
21 licensing through litigation constitutes competitive decision making, because her advice  
22 and counsel necessarily affect licensing decisions”), the Court credits Mr. Ashburg’s  
23 statements indicating his lack of involvement with strategic business and competitive  
24 decisions for both entities. And when it comes to Defendant’s actual competitor—  
25 Anova—Mr. Ashburg maintains a degree of separation, because he has no access to  
26 Anova’s networks and computer systems. Dkt. # 30 at 3-4. Defendant has not shown  
27 that Mr. Ashburg “gives advice or participates in any or all of [Anova’s] decisions ...

1 made in light of similar or corresponding information about a competitor.” *ODS Tech.*,  
2 583 F.Supp.2d at 1144-1145 (quoting *Brown Bag*, 960 F.3d at 1470) (quotations  
3 omitted).

4 Further, the Court agrees that preventing the Mr. Ashburg from accessing highly  
5 confidential material “could impair [Plaintiff’s] ability to prosecute its claims against  
6 defendants...” *MGP Ingredients, Inc. v. Mars, Inc.*, 245 F.R.D. 497, 502 (D. Kan.  
7 2007) (allowing Plaintiff’s in-house personnel access to confidential information  
8 because preventing access would impair Plaintiff’s ability to prosecute claims at the  
9 heart of the suit); *see also L-3 Comm’n Corp. v. Jaxon Eng’g & Maint., Inc.*, 863  
10 F.Supp.2d 1066, 1092 (D. Colo. 2012) (affirming Magistrate Judge decision to allow  
11 current employee access to AEO material because the employee possessed both  
12 expertise and factual knowledge, and was “essential to the ability of the plaintiff to  
13 prove their case”). Mr. Ashburg has been closely involved in this action since its  
14 inception—he indicates that he drafted the complaint alongside Plaintiff’s outside  
15 counsel—and he states that he will continue to work as Plaintiff’s counsel of record.  
16 Dkt. #30 at 3. The Court concludes that Plaintiff will suffer prejudice if Mr. Ashburg is  
17 denied access to highly confidential information because such information will bear on  
18 his advice and counsel to Plaintiff in this litigation. *Javo*, 2020 WL 2062146, at \*4  
19 (finding that Plaintiff would suffer “appreciable prejudice” if former general counsel  
20 and senior executive vice president of operations not provided access to “Outside  
21 Attorneys’ Eyes Only” material because access to such information would bear on their  
22 advice and counsel).

23 Plaintiff has also taken additional precautions to protect the confidentiality of  
24 sensitive information, such as using a third-party discovery vendor to ensure that no  
25 Electrolux or Anova employees have access to Defendant’s discovery materials. And  
26 while it may not be common to allow in-house counsel provided by a parent company  
27 access to Defendant’s highly confidential material, it is hardly “unprecedented” in the

1 Ninth Circuit, as Precision asserts. *See Alza Corp. v. Impax Labs., Inc.*, No. C-03-  
 2 4032VRW, 2004 WL 7339748, at \*4-5 (N.D. Cal. June 21, 2004) (allowing in-house  
 3 counsel of parent company to access confidential information when counsel was not  
 4 involved in competitive decision making or patent prosecution). The Court finds that the  
 5 provisions of the protective order, which allow for the use of confidential material only  
 6 in connection with prosecuting, defending, or settling this litigation, should serve to  
 7 prevent the “unacceptable risk or opportunity for the inadvertent disclosure of  
 8 confidential information.” *ODS Tech.*, 583 F.Supp.2d at 1144.

9 If some factual basis to believe that Mr. Ashburg acts as a competitive decision  
 10 maker for either Anova or Electrolux emerges, Defendant may request a modification of  
 11 the protective order. *Javo Beverage Co., Inc. v. California Extraction Ventures, Inc.*,  
 12 No. 19-CV-2062146, 2020 WL 2062146, at \*5 (S.D. Cal. Apr. 29, 2020) (noting that  
 13 Defendant could renew request to prohibit Plaintiff’s current outside counsel, who was  
 14 formerly general counsel, from accessing highly confidential information should  
 15 Defendant develop a basis to believe that outside counsel was in fact a competitive  
 16 decision maker). The Court shall issue a Protective Order concurrently with this Order.

17 **b. Motion for Relief From a Deadline (Dkt. # 32)**

18 Plaintiff seeks to extend the deadline to join Defendant’s parent company  
 19 Guangzhou Argion Electric Appliance Co., Ltd. (“GAEA”) as a party to this suit and  
 20 move the current close of fact discovery from January 10, 2023 to February 24, 2023.  
 21 Dkt. # 32 at 1. Defendant opposes this request and filed a response. Dkt. # 37.  
 22 According to Plaintiff, it served Defendant with interrogatories seeking information  
 23 regarding Defendant’s corporate structure, parent companies, and subsidiaries in June  
 24 2022. Dkt. # 32 at 2. Defendant objected to providing this information to Mr. Ashburg  
 25 in particular, leading to the submission of the parties’ LCR 26 motion (Dkt. # 28). *Id.* at  
 26 3. On September 2, Defendant supplemented its response to the interrogatories and  
 27 indicated that GAEA is Defendant’s sole owner. Dkt. # 33 (Billick Decl.) at ¶ 5. Soon



1 thereafter, this information was shared with Mr. Ashburg. Plaintiff indicates that it has  
2 served Defendant with further interrogatories regarding GAEA's relationship to the  
3 Accused Product. *Id.* at ¶ 5.

4 Defendant argues that its Rule 7.1 disclosure statement, filed months prior in  
5 March 2022, alerted Plaintiff to the fact that it is a subsidiary of GAEA. Dkt. # 18.  
6 Further, the deadline to join additional parties passed on July 22, and Defendant's  
7 responses to Plaintiff's interrogatories concerning Defendant's parent company were  
8 not due until August 1. Dkt. # 37 at 2. Instead, Plaintiff waited until mid-September to  
9 seek further discovery concerning GAEA and until October to request a modification of  
10 long-set deadlines. *Id.* at 3. Defendant argues that extending the deadline to join GAEA  
11 at this point is not only prejudicial to Anova, but would also extend the case by at least  
12 ten months due to the time it would take Plaintiff to serve China-based GAEA via the  
13 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. Dkt.  
14 # 37 at 5-6. In any event, Defendant states that GAEA is not involved with activities  
15 related to the Accused Product in the United States and does not benefit from sales of  
16 the product. *Id.* at 6. Plaintiff responds that it did in fact move diligently, and that  
17 Defendant only stated that it was a *subsidiary* of GAEA in its corporate disclosure  
18 statement, without mentioning that Anova is *wholly owned* by GAEA. Dkt. # 38 at 2.

19 "[A] schedule shall not be modified except upon a showing of good cause and by  
20 leave of the district judge..." Fed. R. Civ. P. 16(b). "Mere failure to complete discovery  
21 within the timeframe allowed does not constitute good cause for an extension or  
22 continuance." LCR 16(b)(6). On April 22, 2022, this Court ordered that any additional  
23 parties to this action were to be joined by July 22, 2022. Dkt. # 26. Based on  
24 Defendant's Corporate Disclosure Statement, Plaintiff was aware that Precision is a  
25 subsidiary of GAEA since at least March 16, 2022 and yet Plaintiff waited until the July  
26 22 deadline had passed to seek leave from this Court to join GAEA as a party.  
27 Plaintiff's failure to complete necessary discovery within the time allowed does not

1 constitute “good cause” to extend the deadline, especially given that Plaintiff waited  
2 until well after the deadline passed to seek an extension. While Plaintiff claims that it  
3 cannot take Defendant’s statements as to GAEA’s lack of involvement with the  
4 Accused Product at face value, “[p]atent infringement activities ordinarily cannot be  
5 imputed from one company to its parent, subsidiaries, or sister companies.” *Free-Free*  
6 *Indus. Corp. v. First Design Global*, No. EDCV 19-2462-GW-KESx, 2020 WL  
7 7016676, at \*2 (C.D. Cal. Aug. 31, 2020). That means that even if Defendant is found  
8 to have infringed on Plaintiff’s patent, liability would not ordinarily be imputed to  
9 GAEA. Given this, Plaintiff has not shown good cause to modify the deadline to join  
10 additional parties, and the Court **DENIES** Plaintiff’s motion to extend the deadline to  
11 join GAEA as a party. However, given the delay potentially caused by the disagreement  
12 over the extent of Mr. Ashburg’s access to confidential materials produced in discovery,  
13 the Court **GRANTS** Plaintiff’s request to extend the deadline for fact discovery to  
14 February 24, 2023.

15 **c. Motion to Stay Proceedings (Dkt. # 40)**

16 Defendant seeks an order staying the proceedings pending resolution of  
17 Defendant’s pending summary judgment motion and a protective order from a 30(b)(6)  
18 deposition notice served by Plaintiff. Dkt. # 40. Defendant argues that the pending  
19 summary judgment motion is dispositive of the entire case and regardless of whether the  
20 Court decides that Plaintiff’s patent was (1) not infringed, (2) invalid, or (3) both, the  
21 outcome will be dispositive of Plaintiff’s claim. *Id.* at 4. Defendant further argues that  
22 the summary judgment motion is dispositive as to the issues on which Defendant  
23 currently seeks duplicative discovery and that the motion can be decided without further  
24 discovery on Plaintiff’s part. *Id.* at 4-5. Defendant objects to the 30(b)(6) deposition  
25 notice because it seeks discovery on already fully-investigated issues of non-  
26 infringement and invalidity and other non-relevant topics, such as Defendant’s process  
27 of selecting the name “Precision” for its company. *Id.* at 7-8.

1 Plaintiff counters that expert discovery is currently underway and Plaintiff  
2 expects that the resulting testimony will shed light on Defendant's arguments  
3 concerning non-infringement and invalidity. Dkt. # 49 at 9-10. Additionally, Plaintiff  
4 states that it is currently seeking discovery regarding the development and marketing of  
5 the Accused Product and consumer perceptions of the design of the Accused Product,  
6 which Plaintiff argues is relevant to the issue of infringement. *Id.* at 12.

7 "Under Federal Rule of Civil Procedure 26(c), district courts, upon a showing of  
8 'good cause,' have broad discretion in determining whether to stay discovery pending  
9 the resolution of a potentially dispositive motion." *Ziegler v. Hotel California by the*  
10 *Sea, LLC*, No. C21-1702-TL-SKV, 2022 WL 1499670, at \*2 (W.D. Wash. May 12,  
11 2022) (citing *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988)). The Court  
12 must consider two factors in deciding whether to grant a stay: "First, the pending  
13 motion must be potentially dispositive of the entire case, at least on the issue to which  
14 discovery is directed. Second, the court must determine if the pending dispositive  
15 motion can be decided without additional discovery." *Ahern Rentals, Inc. v.*  
16 *Mendenhall*, C20-0542-JCC, 2020 WL 8678084, \*1 (W.D. Wash. July 9, 2020)  
17 (citations omitted). However, to "relieve a party of the burdens of discovery while a  
18 dispositive motion is pending... is the exception and not the rule." *Ziegler*, 2022 WL  
19 1499670, at \*2 (quoting *White v. Skagit Bonded Collectors, LLC*, No. C21-0697-LK,  
20 2022 WL 508825, at \*1 (W.D. Wash. Jan 24, 2022)). The Court declines to make this  
21 case an exception.

22 The Court finds that Defendant has not demonstrated the requisite good cause to  
23 stay discovery. Without prejudging the merits of Defendant's motion, the Court finds  
24 that while the pending summary judgment motion may indeed be dispositive, to stay  
25 discovery at this point could prevent Plaintiff from "present[ing] facts essential to  
26 justify its opposition" to summary judgment. Fed. R. Civ. P. 56(d). Summary judgment  
27 is generally "only appropriate after a nonmovant has had adequate time for discovery."

1 *Baca v. Biter*, No. 1:15cv1916-DAD-HBK (PC), 2021 WL 1130794, at \*5 (E.D. Cal.  
2 Mar. 24, 2021). Under the current case schedule fact discovery is due to close on  
3 January 10, 2023, expert discovery closes on April 28, and the deadline to file  
4 dispositive or *Daubert* motions is May 31. Ongoing fact discovery, particularly expert  
5 discovery, is fertile ground for investigation and may provide information of relevance  
6 to Plaintiff's defense of the summary judgment motion. "Dispositive motions are not an  
7 absolute reason to stall discovery." *United States v. Bayley*, No. 3:20-cv-05867-DGE,  
8 2022 WL 1014993, \*10 (W.D. Wash. Apr. 5, 2022). This is particularly true  
9 considering the recent delays in discovery concerning access to confidential documents  
10 by Mr. Ashburg. *See supra* Part III(a). Additionally, ordering a stay would not  
11 necessarily conserve judicial resources. Should Defendant's summary judgment motion  
12 be denied, it would then likely be necessary to extend the parties' discovery deadlines,  
13 which would impact the remaining dates on the case schedule. Because the Court will  
14 not stay discovery, the Court also declines to issue a protective order from Plaintiff's  
15 30(b)(6) deposition notice and declines Plaintiff's invitation to issue a sanction against  
16 Defendant. The Court **DENIES** Plaintiff's motion to stay proceedings and for a  
17 protective order from Plaintiff's 30(b)(6) notice.

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